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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

TAVITA TUUAIPEA,

Defendant and Appellant.

C070370

(Super. Ct. No. 10F06101)

Defendant Tavita Tuuaipea pled no contest to unlawfully taking or driving a vehicle (Veh. Code, § 10851, subd. (a)) and admitted a prior strike conviction (Pen. Code, §§ 667, 1170.12)<sup>1</sup> and enhancements for a prior violation of Vehicle Code section 10851, subdivision (a), (§ 666.5, subd. (a)) and a prior prison term (§ 667.5, subd. (b)). The trial court sentenced defendant to a stipulated state prison term of seven years, and awarded 675 days of presentence credit (451 actual and 224 custody).

On appeal, defendant contends the trial court's failure to award additional conduct credits pursuant to the Criminal Justice Realignment Act of 2011 (Stats. 2011, ch. 15,

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<sup>1</sup> Subsequent undesignated statutory references are to the Penal Code.

§ 482, Stats. 2011, ch. 39, § 53, and Stats. 2011, 1st Ex. Sess., ch. 12, § 35; hereafter Realignment Act) is contrary to the statutory language and deprived him of equal protection under the law. We affirm.

## DISCUSSION

Defendant committed his offense on September 15, 2010. He was sentenced on December 9, 2011.

Under the law in effect at the time, a defendant with a prior serious conviction was entitled to two days of conduct credit for every four days of presentence custody. (Former § 4019, as amended by Stats. 2009, 3d Ex. Sess., ch. 28, § 50.)

The Realignment Act amended the law, entitling defendants to two days of conduct credits for every two days of presentence custody. (§ 4019, subds. (b), (c), (f).) The award of credits is not reduced by a defendant's current or prior conviction for a serious felony. The provision contains a savings clause, which states: "The changes to this section enacted by the act that added this subdivision shall apply prospectively and shall apply to prisoners who are confined to a county jail, city jail, industrial farm, or road camp for a crime committed on or after October 1, 2011. Any days earned by a prisoner prior to October 1, 2011, shall be calculated at the rate required by the prior law." (§ 4019, subd. (h).)

Defendant claims this provision is ambiguous. Defendant admits that the phrase "shall apply prospectively and shall apply to prisoners who are confined to a county jail, city jail, industrial farm, or road camp for a crime committed on or after October 1, 2011" suggests that the changes to conduct credits apply only to crimes committed after that date. However, defendant asserts that the last sentence -- "Any days earned by a prisoner prior to October 1, 2011, shall be calculated at the rate required by the prior law" -- creates an ambiguity because it would be impossible to earn conduct credits in presentence confinement for an offense that has not been committed. He concludes that the statute should be construed to apply the changes in conduct credits to all presentence

custody occurring on or after October 1, 2011. In a supplemental brief, defendant contends that a contrary construction would deny him equal protection under the law as he is similarly situated with those prisoners who commit their crimes on or after October 1, 2011.

In *People v. Brown* (2012) 54 Cal.4th 314 (*Brown*), our Supreme Court addressed whether the prospective application of the January 25, 2010, amendment to section 4019 (Stats. 2009, 3d Ex. Sess., ch. 28, § 50), which increased conduct credits, violated a defendant's equal protection rights. (*Brown, supra*, 54 Cal.4th at p. 318.) Our high court held that prospective application of a law increasing the award of conduct credits did not violate a defendant's equal protection rights. (*Id.* at p. 330.)

Our high court recently rejected an equal protection claim regarding conduct credits awarded under the Realignment Act in *People v. Lara* (2012) 54 Cal.4th 896, 906, fn. 9 (*Lara*). Reiterating its reasoning in *Brown*, the court stated, “ “[t]he obvious purpose” ’ of a law increasing credits “is to affect the behavior of inmates by providing them with incentives to engage in productive work and maintain good conduct while they are in prison.” [Citation.] “[T]his incentive purpose has no meaning if an inmate is unaware of it. The very concept demands prospective application.” ’ (*Brown, [supra*, 54 Cal.4th] at p. 329, quoting *In re Strick* (1983) 148 Cal.App.3d 906, 913.) Accordingly, prisoners who serve their pretrial detention before such a law's effective date, and those who serve their detention thereafter, are not similarly situated with respect to the law's purpose. (*Brown*, at pp. 328-329.)” (*Lara, supra*, 54 Cal.4th at p. 906, fn. 9.)

*Brown* and *Lara* apply here. Consequently, we reject defendant's equal protection claim.

Defendant's statutory construction contention was recently rejected in *People v. Ellis* (2012) 207 Cal.App.4th 1546 (*Ellis*), in which the Court of Appeal stated: “In our view, the Legislature's clear intent was to have the enhanced rate apply *only* to those

defendants who committed their crimes on or after October 1, 2011. (*See People v. Lara, supra*, 54 Cal.4th at p. 906, fn. 9.) The second sentence does not extend the enhanced rate to any other group, but merely specifies the rate at which all others are to earn conduct credits. So read, the sentence is not meaningless, especially in light of the fact the October 1, 2011, amendment to section 4019, although part of the so-called realignment legislation, applies based on the date a defendant's crime is committed, whereas section 1170, subdivision (h), which sets out the basic sentencing scheme under realignment, applies based on the date a defendant is sentenced." (*Ellis, supra*, 207 Cal.App.4th at p. 1553.)

We agree with *Ellis* and accordingly reject defendant's claim.<sup>2</sup>

#### DISPOSITION

The judgment is affirmed.

BLEASE, Acting P. J.

We concur:

HULL, J.

MAURO, J.

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<sup>2</sup> Additionally, we note that defendant's contention is based on a case in which review was granted after defendant's opening brief. (*See People v. Olague* 205 Cal.App.4th 1126, review granted Aug. 8, 2012, S203298.) The Supreme Court denied review in the case we follow, a decision rejecting *Olague's* interpretation of section 4019, subdivision (h). (*People v. Ellis, supra*, 207 Cal.App.4th at p. 1553, review den. Oct. 31, 2012, S205334.)